

**SCPD POLICY AND LAW COMMITTEE MEETING MINUTES  
FEBRUARY 8, 2018 – 1:00 PM  
SMYRNA REST AREA - SMYRNA, DE**

**Members Present:** Marge Turner, Co-Chair; Daniese McMullin-Powell, Co-Chair; Moni Edgar, CAP/SILC/UCP; Kathie Cherry, GACEC; Pat Maichle, DDC; Laura Waterland, DLP; Despina Wilson, IRI; Jamie Wolfe, SCPD; and Amber Rivard, Support Staff.

**GUEST:** Bill Powell

**CALL TO ORDER**

Daniese called the meeting to order 1:44 pm.

**ADDITIONS OR DELETIONS TO THE AGENDA**

- Federal Legislation with negative impact to ADA (H.R. 620)
- Federal Legislation – MFP (Money Follows the Person)
- Email regarding whether people with intellectual disabilities should be allowed to have sex

**APPROVAL OF MINUTES**

Pat made a motion to approve the January 11<sup>th</sup> minutes and Laura seconded the motion. The January 11<sup>th</sup> minutes were approved as submitted.

**REVIEW OF REGULATIONS AND LEGISLATION**

**Proposed Regulations**

1. DMMA Amending Fair Hearing Regulation DSSM 5304.3[21 DE Reg. 606 (February 1, 2018)] – Laura reviewed her observations and recommended amendments. Laura made a motion that SCPD write a letter with recommended amendments, including changing the language in 5304.3 that allows the MCO to offer “one level of appeal” after issuing a decision on an appeal appears to violate the regulation. The Councils should ask that it be withdrawn, and that the regulation be further amended to make clear that conciliation services are voluntary and do not impact the appeal and/or fair hearing procedures. Pat seconded the motion, but added that DMMA and MCOs need to do more outreach to notify people of these changes. Motion was carried with no one opposing or abstaining. Comment was made that this is a significant change. Marge asked how long people have to appeal a decision. Laura explained that people have 90 days to appeal an adverse action and 10 days to continue with the benefits. Laura added that it is important to attach the envelope to the letter to prove when letter was mailed since there can be a two week delay between the date of the letter and when it was actually mailed. This is a federally required regulation.

2. DMMA Amending CHIP regulations [21 DE Reg. 608 (February 1, 2018)]. No further action taken.

### Final Regulations

1. Final DMMA SPA Targeted Case Management for Children and Youth with Serious Emotional Disturbance [21 DE. Reg. 628]. Laura reviewed comments submitted by GACEC. No further action taken.
2. Final DMMA Amendment for Prior Medical Costs Reg. [21 DE. Reg. 637 (February 1, 2018)]. Laura stated that DMMA rejected the suggestion that one year was not a sufficient amount of time to process insurance claims. No further action taken.
3. DSS Final Regulation on Relative Child Care [21 DE. Reg. 639 February 1, 2018]. DSS rejected all of the proposed changes and recommendations, including leaving in substantial training requirements for all relative child care providers (who are not licensed). Laura made a motion that the Councils send a letter reiterating their concerns regarding this one size fits all approach to family needs and request that DSS issue additional regulations clarifying its obligation to provide accommodations for families with special needs. If they are “amenable” to doing something they are required by law to do, they should put in their regulations. Marge added that we speak strongly about our concerns, and if there are going to be exceptions, there needs to be established protocol so people know what they need to do. Pat seconded the motion. Motion was carried with no one opposing or abstaining. Laura added that the broader issue is that they are requiring a substantial amount of training for all relative child care providers (who are not licensed). Laura commented the letters are cut and pasted and things are in the letters that should not be.

### Proposed Legislation

Laura stated that these comments are preliminary and will be further fleshed out after conversations with the Policy and Law Committees of the Councils. There are series of bills related to sentencing and other criminal justice issues for juveniles. All appear to relate to the idea that juvenile offenders should not be treated as adult offenders, and that judges should have more discretion in formulating sentences.

HB 305. This bill amends 16 Del. Code §4751B by removing juvenile adjudications from the list of “prior qualifying Title 16 convictions” that can lead to vastly increased sentences for subsequent drug offenses as an adult. Judges can continue to use juvenile sentences as a factor in adult sentences, but the juvenile convictions will no longer automatically trigger enhanced penalties.

HB 306. Currently, every person over the age of 15 who is in possession of a firearm during the commission of a Class B felony must be tried as an adult in the adult court system. HB 306 seeks to amend 11 Del. Code §1447A by leaving the decision to try a minor as an adult under these circumstances to the judge and also raises the age to over 16. Superior Court could choose

under the proposed revision to send a case back to Family Court. It is worth noting that this discretion was given back to Superior Court last year for other felonies that were previously non-discretionary. (HB 9).

HB 307. This bill repeals 10 Del. Code §1009 and 11 Del Code §1448 to remove all mandatory minimum sentencing schemes for juveniles adjudicated delinquent in Family Court.

HB 308. This bill removed the sunset provision in HB 405 of the 148<sup>th</sup> General Assembly to allow the continuation of a program allowing the issuance of civil citations to juveniles who have committed minor misdemeanors as an alternative to arrest and the introduction of the criminal justice system. This bill has already passed both houses and is awaiting signature.

SB 146. This bill seeks to amend 10 Del. Code §1017 to require the mandatory expungement of felony cases that were terminated in favor of the child.

#### *Analysis of Juvenile Crime Bills:*

All of these bills are efforts to have the criminal code to allow judges more discretion in crafting appropriate sentences for juvenile offenders. The philosophy underpinning the proposed changes is the recognition that juveniles should not be viewed as, and treated like, adults in the criminal justice system. The bills also reflect the understanding that juveniles are not yet fully developed and do not have the same ability to control impulses and make good decisions that we expect from adults.

There are a myriad of reasons why it is good public policy to enable juvenile offenders to stay in the Family Court and juvenile justice system. Exposing juveniles to adult jails is dangerous and undermines rehabilitation efforts. The adult corrections system will not address the underlying issues that may have led to the offender's criminal behavior, setting the juvenile offender up for a lifetime of criminal behavior when targeted treatment may lead to a better outcome. These measures will also help to address the disproportionate representation of minority children and children with disabilities in the correctional system by diverting young offenders to treatment or other more appropriate settings. Laura made a motion that the Councils endorse these bills as advancing a more nuanced approach to juvenile justice in Delaware that will lead to better long term outcomes and will help to address the disproportionate share of persons with disabilities and minorities that are currently incarcerated. Pat commented that it is an automatic set up that they will be in the correction system the rest of their lives. Pat seconded the motion and putting all the bills together. Motion was carried with no one opposing or abstaining.

HB 294. This bill seeks to amend Title 21 to transfer the responsibility for establishing, administering and setting fees for courses of instruction and programs for rehabilitation for individuals who have had their licenses revoked for driving under the influence of drugs or alcohol from the Department of Homeland Security to the Division of Substance Abuse and Mental Health. Marge commented that she had a concern that people who go through DSAMH fall through the cracks and who will be keeping track of what these people need. She noted that DSAMH would have better trainings around alcohol and addiction issues. Marge stated that although she supports the legislation, she has reserves if people will receive the help they need.

Laura commented that they may be able to engage people in long term care treatment. Daniese spoke about people having the choice to take the treatment voluntarily first instead of mandatorily. Despina asked for clarification on how the process would work. Laura made a motion that the Councils endorse this legislation because DSAMH has the expertise to address the rehabilitation needs of individuals with substance abuse issues and is in a better position to provide services that these offenders may need. We need to ensure that the program is properly supported and funded so that it is effective under DSAMH. Pat seconded the motion and motion was carried with no one opposing or abstaining.

#### Potential legislation Shifting Burden of Proof in Special Education Due Process Hearings –

There has been some discussion, starting last spring, about an initiative to change current Delaware law, codified at 14 Del. Code §3140, to shift the burden of proof in special education due process hearings from children with disabilities to school districts. There is currently some legislation in draft form that attempts to do this. The impetus appears to be that some districts are concerned about the amount of legal fees that they have had to pay over the last few years to private attorneys who have successfully represented children with disabilities in special education cases. In many cases, districts choose to settle cases with fees rather than taking them to hearing.

It is worth noting at the outset that very few cases go to due process hearing; in statistics from DDOE, for 2015-2016, there were only 6 hearings that went to adjudication, of 33 total requests. Twenty-five were withdrawn or dismissed, and the rest went to mediation. Earlier years averaged only 16 requests per year, with only a small fraction going to hearing. The legislature in the past has expressed concern that more children with disabilities and their families are not taking advantage of due process; it is therefore ironic that when children with disabilities and their families are now successfully asserting their rights, some want to change the law in an attempt to make it more difficult for them to succeed.

It is also worth noting that the law firm that handles many of these cases for children with disabilities is also extremely effective in representing children in Pennsylvania, where the burden of proof is on the family. Districts are likely mistaken in believing that changing the burden of proof will stop them from having to expend funds in disputed special education cases. It is certainly possible that another motivation for the change is to try generally to discourage children with disabilities and their families, especially those without representation, from pursuing the relief and the process to which they are entitled to by law by making the process even more daunting and difficult.

By way of background, Delaware has placed the burden of proof on school districts since the 1970s. Delaware has a "time-honored" jurisprudence of placing the burden on public agencies. (The agency has the burden of proof in Medicaid appeals, for example). S.B. No. 160, which was introduced through the GACEC, codified the burden of proof in statute in 1983; however the statute only codified Delaware regulations (AMSES; AMPEC) dating back to the inception of the federal IDEA in the 1970s.

The United States Supreme Court in 2005 ( Schaffer v. Weast, 546 US 49 (2005)) ruled that under the IDEA the burden of proof is on the petitioning party (the children with disabilities) by

default, but that states can affirmatively designate by statute or regulation which party has the burden of proof. This means that if state law is silent on the subject, the burden is on the children with disabilities. While a number of state statutes are silent or explicitly place the burden of proof on the children with disabilities, the trend in recent years has been for states to adopt laws imposing the burden on public agencies. A number of states have ambiguous statutes or regulations.

Currently, Connecticut, Delaware, Florida, Nevada, New Jersey, New York, and Oregon explicitly place the burden of proof on the school district. Initiatives are underway in Pennsylvania and Maryland to shift the burden of proof from the children with disabilities to the districts.

Burden of proof is especially significant in special education cases. School districts are at an enormous advantage, as to a large degree their employees control the content and scope of evaluations and IEPs, as well as special education procedures. Districts are also the keepers of relevant records and information, and witnesses. Districts make the decisions to deny eligibility or deny or limit the scope of services. Districts are in the best position to articulate and support those decisions, as they are the party with both information and specialized knowledge. Putting children with disabilities in the position of having to prove that a district is not providing appropriate services places them at a disadvantage in a daunting process that is already skewed in the district's favor. Bear in mind that the due process hearing is usually the first opportunity for the dispute to be heard by someone outside of the district. Shifting the burden creates an unfair and unnecessary barrier.

If in fact cases lack merit, districts should not be so quick to settle them, as only prevailing parties can obtain legal fees under special education due process rules. Children with disabilities in Delaware should not be punished because other families are achieving better outcomes due to the expertise of trained counsel. Finally, there can be no argument that shifting the burden of proof somehow benefits children with special education needs and their families. The change would only benefit school districts seeking to avoid having their decisions challenged.

For the foregoing reasons, Laura made a motion that the Councils should oppose any legislative initiative to alter the current law placing the burden of proof in due process hearings on school districts. A letter will be sent to Representative Jaques about our concerns and that we will not support this legislation followed up with a meeting with Marge, John and Wendy. Marge commented that she, John and Wendy could deliver the letter and meet with Representative Jaques.

## **OTHER BUSINESS**

Federal Legislation with negative impact to ADA (H.R. 620) – Daniese spoke about this legislation, which puts a great burden on people with disabilities against businesses that are not compliant with ADA. The person must show documentation as to why the business is out of compliance. There are many steps to go through before the person is able to get an attorney to file a civil lawsuit. Marge commented that the Department of Justice seemed to be getting more involved with ADA cases and asked why they are not getting involved. This action came as a

results of a few nuisance complaints. Laura commented that the only action is to contact legislators. Pat noted that it is coming up for a vote next week in Congress. Laura added that organizations can sign onto letters from national organizations. No motion was made since it needs to be addressed on an individual level. This discussion was meant for educational purposes.

MFP (Money Follows the Person) – Daniese spoke about federal legislation (S. 2227) to reinstate MFP so that people are getting person-centered services using Medicaid dollars for transitioning from institutions out to the community. There are positive changes that include dropping the institutional requirement from 90 days to 60 days. This legislation is called “Ensuring Medicaid Provides Opportunities for Widespread Equity, Resources, and Care Act” or the “EMPOWER Care Act”. Daniese also spoke about the Disability Integration Act (S. 910), which does not require institutionalization or source of funding. This bill makes it a civil right to live in the community. Currently the bias is toward institutionalization if you qualify for it instead of getting your services in the community first. Despina spoke about their advocacy program (one of four core services) for IRI (Independent Resources, Inc.). She spoke to John about the platform which they can take issues discussed in this forum and make them statewide initiatives such as advocacy or youth transition. She added that they are making good inroads, but more can be done in working with key partners. Marge commented that encouraging teens to get behind some of this legislation would be great and the legislators would listen to them.

Laura spoke about H.B. 285 and H.B.302. She noted that Governor Carney and DHSS Secretary Walker have come out in support of H.B 302. She said that both of these bills tie into the mental health commitment standard to enable treatment providers to call the police if they think the client is demonstrating behaviors that are deemed dangerous. Although the bill’s intent is to be a destigmatizing bill, but it has the opposite effect and is strictly tied to persons with mental health. She also said that many people do not meet the mental health commitment standard. There is concern about the scope of the bill and the lack of specificity. There is concern about the civil rights and policy aspects of this bill. This legislation should apply to everyone if concerned about stopping violent acts. Pat commented that she spoke to Representative Bentz about H.B. 302 and he said that they are working to come to some agreement between the two bills. Laura is not making a recommendation to the Committee, but is providing information. A motion was made that the Councils send a letter sharing observations and concerns with legislators regarding H.B. 285 (not H.B. 302) and attach Liz’s memo. Pat seconded the motion and motion was carried with no one opposing or abstaining.

Email regarding whether people with intellectual disabilities should be allowed to have sex – Pat spoke about an email she received from the Delaware Sexual Assault Center asking for our thoughts on this particular issue. An email from Laela Kashan, staff attorney, from the Kentucky Association of Sexual Assault Programs was shared. Kentucky has a law that states that anyone with intellectual disabilities is incapable to consent to sexual activity. Pat commented that she replied that we do not have a law like that in Delaware, but she wanted to bring it to our attention. She said that if a person lives in a group home or supervised apartment in Delaware, people are not allowed to have sex in Delaware. She added that before Jane Gallivan came to DDDS, a couple with intellectual disabilities who decided to get married could not live together in a group home. It is not a law, but is covered by policy in the group home. There are no

restrictions outside of the group home setting. John will make an inquiry with DDDS to see what their policy or regulation is on this issue in a residential setting or in an institution. Daniese said that we should have concern that it happens to a small portion of people here in Delaware and address it as a Committee.

#### **ANNOUNCEMENTS**

None

#### **PUBLIC COMMENT**

None

#### **ADJOURNMENT**

The meeting was adjourned at 3:09 pm.

Respectfully submitted,

Jo Singles  
Support Staff

policy & law/min 2-8-18